

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of the Town of Foxborough)
Regarding Streetlight Purchase)

D.T.E. 02-30

**Massachusetts Electric Company's Motion to Dismiss the
Petition of the Town of Foxborough**

Massachusetts Electric Company ("Mass. Electric" or "Company") hereby moves to dismiss the Petition of the Town of Foxborough ("Foxborough" or "Town"). In support of its motion to dismiss, the Company is submitting with this pleading the affidavit of June Wooding, a Mass. Electric account manager, although the Department need not consider the facts contained in the affidavit in order to grant this motion.

Introduction

The Town commenced this action by filing a petition at the Department of Telecommunications and Energy ("Department").¹ In its petition, the Town alleges that the Company has failed to provide the Town with the purchase price of streetlights owned by the Company and leased by the Town pursuant to the S-1 tariff² that the Town wishes to purchase. In addition, with regard to lights owned by the Town and served

¹ Although the petition itself is not dated, and there is no certificate of service, the cover letter to the Department is dated April 24, 2002, and the Company received a copy on April 26, 2002.

² The Company requests that the Department take administrative notice of all Mass. Electric tariffs discussed in this Answer and Motion to Dismiss, which are on file at and approved by the Department.

under the Company's S-2 tariff, the Town alleges that the Company should allow the Town to convert these streetlights to the Company's S-5 tariff on two months notice.³

Statement of Facts

Mass. Electric is a distribution company in Massachusetts under the jurisdiction of the Department. Foxborough is in Mass. Electric's service territory.

The Town currently owns approximately 750 streetlights, which Mass. Electric serves pursuant to the S-2 tariff. Petition ¶ 3; Affidavit of June Wooding. The S-2 tariff is one of Mass. Electric's street lighting tariffs for customer owned equipment. It is closed to new customers, but existing customers may add, remove, or relocate existing lights under the S-2 tariff. Foxborough has taken service under the S-2 tariff since 1991 pursuant to a service agreement ("Agreement") that the parties executed in 1991. Petition Appendix B 6-20. Pursuant to its terms, the Agreement became effective on December 8, 1991, and after an initial term of five years, was automatically renewed each July 1. Petition Appendix B-7 ¶2(a). A party wishing to terminate the Agreement must give the other party six months notice prior to the date on which the Agreement would otherwise be automatically extended of its intention to terminate. Petition Appendix B-7 ¶2(a).

³ In its filing, Foxborough also states that Mass. Electric's streetlight maintenance has been neglectful, and that Republic Electric has "moved quickly to restore streetlights service." See, e.g. the affidavit of Andrew Gala at Petition Appendix C-3; ¶16. Although this point is irrelevant to this proceeding, Mass. Electric vigorously disputes this assertion. In Foxborough, Mass. Electric's average streetlight maintenance response time is less than one day. In addition, although Foxborough hired Republic Electric effective January 1, 2002, Mass. Electric has continued to recognize its obligation under the S-2 tariff to continue to perform streetlight maintenance, and has not reduced its streetlight maintenance activities in 2002 compared to prior years. See the Affidavit of June Wooding.

By letter dated November 1, 2001, Foxborough notified the Company that it wished to discontinue service for the lights served under the S-2 tariff, and take service pursuant to the S-5 tariff effective January 1, 2002. Petition ¶3. The S-5 tariff is also a tariff for customer owned streetlighting equipment, subject to certain caveats. The Company developed the S-5 tariff in response to the requirement in the Electric Restructuring Act of 1997, set forth in M.G.L. c. 164, §34A, that the Company sell the streetlights that it owns to municipalities wishing to purchase them. See D.T.E. 98-69, in which the Department approved this tariff, also known as the “Alternative Tariff,” based on language in the statute. By its terms, the S-5 tariff is available “to any municipal Customer that has purchased designated Company street lighting equipment pursuant to G.L. c. 164, § 34A.” S-5 tariff, Sheet 1, Availability Clause. In addition, the rate is available to “any municipal Customer that has purchased the Company’s streetlighting equipment pursuant to the Company’s Rate S-2, . . . or Rate S-3, . . . provided that the Customer has complied with all provisions and terms of the rates and any related service agreements.” Id.

Accordingly, in a letter dated January 4, 2002, the Company notified Foxborough that it would accept the Town’s November 1, 2001 letter as notice of intent to exit the S-2 rate, effective upon the completion of the S-2 notice requirements, or July 1, 2002. Petition A-9.

In the Town’s November 1, 2001 letter, the Town also stated:

We are also considering converting the balance of the streetlights in Foxborough which are currently owned by Massachusetts (National Grid) to the alternative S5 tariff. Our decision in this regard will depend on the purchase price of these streetlights. Please provide us with the depreciated book value purchase price of the Massachusetts Electric (National Grid) owned streetlights in the Town so that we can evaluate the conversion of those additional streetlights.

Petition Appendix A-2. Based on this request, the Company began a thorough review of Foxborough's street lighting inventory. Affidavit of June Wooding. On March 1, 2002, Mass. Electric account manager June Wooding sent Foxborough Town Administrator Andrew Gala a letter explaining that the Company was performing an inventory of the town's equipment. Affidavit of June Wooding; Petition Appendix A-16. She further stated that she hoped to "get these updated values to you before the end of this month." Id. The Company did in fact complete this inventory and develop a purchase price consistent with the methodology set forth by the Department in D.T.E. 01-25. Affidavit of June Wooding. Ms. Wooding called Andrew Gala in the beginning of April 2002 to tell him that the Company had completed its calculation of the purchase price and request a meeting to present the information. Affidavit of June Wooding. Mr. Gala stated that he would respond to Ms. Wooding's request for a meeting, but did not. Id. Instead, the Company received a copy of the Town's petition in this proceeding.

The Company remains ready, willing, and able to present the purchase price information to the Town. Id.

Argument

- A. The Department should dismiss the Town's request for a Department ruling on the required notice necessary prior to converting Town-owned lights from the S-2 rate to the S-5 rate.

The facts alleged by Foxborough, even if true, do not give rise to a claim for relief as a matter of law.

M.G.L. c. 164, §34A, promulgated in 1997, provides that "[a]ny city or town receiving street lighting service from an electric company pursuant to a tariff which

provides for the use by such municipality of lighting equipment *owned by the electric company*, such as lighting ballasts, fixtures, and other equipment necessary for the conversion of electric energy into street lighting service, shall have rights with respect to such lighting equipment as set forth in this section. (emphasis added). The statute then sets forth in great detail how to make the transaction happen, including how to value the lighting equipment, the time frame of the sale, the role of the Department in resolving disputes governing the purchase, and the development of the Alternative Tariff. By its explicit terms, the statute applies only to the sale by an electric company of its lighting equipment to municipalities, and does not apply to equipment already owned by a municipality. Thus, Foxborough is mistaken in its belief that this statute gives it rights with regard to the lights that it currently owned, as the statute does not apply.

In addition, the Company's S-5 rate clearly sets forth the circumstances under which a municipality is eligible for the rate. Because Foxborough did not purchase these lights pursuant to M.G.L. c, 164, §34A, but has owned them for six years prior to the enactment of that statute, Foxborough may not avail itself to the S-5 rate immediately. Instead, it must comply with the provision of the S-5 tariff that states that "any municipal Customer that has purchased the Company's streetlighting equipment pursuant to the Company's Rate S-2, . . . or Rate S-3" may take service pursuant to the S-5 rate provided that it "has complied with all provisions and terms of the rates and any related service agreements." Thus, Foxborough can switch its service over to the S-5 rate after it fulfills the notice provision set forth in its S-2 service agreement, which requires six months notice prior to each anniversary July 1 anniversary date. Because Foxboro gave notice to

Mass. Electric on November 1, 2001, it will be eligible to switch to the S-5 rate on July 1, 2002.

- B. The Department should dismiss Foxborough's request for Department rulings on various issues related to the purchase price because these issues are not ripe for Department involvement.

The Department has jurisdiction over street lighting disputes once a municipality has exercised its option to purchase its streetlights. M.G.L. c. 164, § 34A(d) provides as follows:

In connection with the exercise by any municipality of the option to convert its street lighting service pursuant to subsection (a), any dispute concerning the terms of the alternative tariff, the compensation to be paid the electric company, or any other matter arising in connection with such exercise, including, but not limited to, the terms on which space is to be provided to the municipality in accordance with subsection (c), shall be resolved by the department within 60 days of any request for such resolution by the municipality or any person involved in such dispute. (emphasis added).

As shown in Foxborough's petition, Foxborough has not exercised any option to buy streetlights currently served under the S-1 tariff. Instead, Foxborough has told Mass. Electric that it is "considering" purchasing the streetlights currently owned by the Company and taking service under the S-5 tariff. (Petition Appendix A-2). This does not constitute the affirmative exercise by the Town of an option to convert its streetlighting service, and thus it is premature for the Department to become involved.

The statute sets forth no time requirement for the Company's calculation of a purchase price for a municipality. There are two sixty-day requirements in the statute, one regarding the actual conversion by the municipality and the other regarding the Department's time to resolve disputes, but none regarding the development of a purchase

price. As indicated above, Foxborough did not affirmatively elect the option to convert the lights currently served under the S-1 tariff to the Alternative Tariff. Rather, the Town stated that it was merely “considering” a conversion, and it requested the prices to that it could “evaluate that option.” The statute does not contemplate that such an exploratory, tentative interest would create the binding obligation alleged by Foxborough. Therefore, the Company has not failed to comply with any legal requirement to provide a purchase price within a certain amount of time.

Nonetheless, the Company recognizes that it is important to respond to municipalities in a timely way, and is attempting in all cases to perform the large and complex inventories necessary to calculate purchase prices. The Company regrets that Foxborough is dissatisfied with the turn-around time on this matter, and is endeavoring to provide the relevant information as soon as possible.

As set forth in June Wooding’s affidavit, the Company has completed its calculation of the purchase price in accordance with the Department’s methodology and has requested a meeting with Foxborough to present the information. Only if Foxborough disputes the purchase price after the Company has presented it, and Foxborough and Mass. Electric are not able to resolve their differences, would this matter become ripe for review by the Department.

Conclusion

For all of the above-stated reasons, the Department should dismiss Foxborough's petition. In the event that the Department does not grant all or a portion of this motion to dismiss, the Company requests the right to file an answer to the petition.

Respectfully submitted,

MASSACHUSETTS ELECTRIC
COMPANY

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